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Proctors for Respondent.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

Nos. 424 and 425

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent,

and

GUSTAV SCHOENAMSGRUBER,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent.

BRIEF FOR PETITIONERS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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Subject Index

Page

Reference to the Official Report of the Opinions Delivered in the Courts Below 2

I. Statement of the grounds on which the jurisdiction of this court is invoked 2

II. The specific claims advanced, and the rulings made, in the lower court, which are relied upon as the basis of this court's jurisdiction, are as follows, to-wit 2

III. The statutory provisions 6

IV. A reference to the cases believed to sustain the jurisdiction 6

A Concise Statement of the Case 7

Specification of Such of the Assigned Errors as are Intended to be urged 9

V. The argument 9

Summary of the argument 9

I.

The decision of the Circuit Court of Appeals is contrary to and in conflict with all the prior federal and state court decisions touching the appealable character of a decree directing the parties to proceed to arbitrate 10

II.

The purported arbitration provision of the contract is void because it shows on its face that it is an attempted ouster of the jurisdiction of the courts 17

III.

The so-called arbitration agreement is against public policy and void as an attempt by the steamship company not only to save itself from torts committed by its servants, but to compound their crimes. Any provision in a contract of a carrier, by land or sea, wherein the carrier exempts itself from liability for injuries is void and against public policy 25

IV.

The so-called arbitration provision, even if otherwise valid, is not binding upon Hildegard Schoenamsgruber, a minor 30

Conclusion 32

Table of Authorities Cited

Cases	Pages
Beechwood, The, 35 Fed. (2d) 41	13
Blodgett v. Bebe Co., 190 Cal. 665, 214 Pac. 38, 26 A. L. R. 1073	24
Britton v. Williams, 6 Munf. 453	32
California Prune and Apricot Growers' Ass'n. v. Catz American Co., 60 Fed. (2d) 788	3, 6, 12, 16
Cox v. Graves, 55 Fed. (2d) 217	14
Carpenter, Estate of, 127 Cal. 582, 585	31
District of Columbia v. Bailey, 171 U. S. 161, 43 L. Ed. 118, 124	31
France & Canada S. S. Co. v. French Republic, 285 Fed. 290	12
Gardner v. Grand Beach Co., 29 Fed. (2d) 481	15
Glenmavis, The, 69 Fed. 472	27
Guaranty Trust and Safe Deposit Company v. Green Cove and Melrose Railroad Co., 139 U. S. 137	18
Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779	3, 6, 11
Kensington, The, 46 Law. Ed. 190	27
Krauss Bros. v. Bossert & Sons, 62 Fed. (2d) 1004	3, 6, 10
Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386	3, 6, 11
Millsaps v. Estes, 137 N. C. 535, 70 L. R. A. 170	31, 32
Moses v. Hamburg American Packet Company, 88 Fed. 329	28
New England, The, 110 Fed. 415	28
Oceanic Steam Navigation Co. v. Corcoran, 9 Fed. (2d) 724	29
Oneida Navigation Corporation v. W. & S. Job & Co., 252 U. S. 521	12
Potomac Steamboat Co. v. Baker Salvage Co., 123 U. S. 40	19
Silverbrook, The, 18 Fed. (2d) 144, 147	13
Thurston, In re, 48 Fed. (2d) 578	21, 23

Pages

Utility Oil Corp., In re, 69 Fed. (2d) 524..... 6, 12

Waialua Agr. Co. v. Christian, 52 Fed. (2d) 847..... 15

Codes and Statutes

Judicial Code, Section 240..... 6

70 L. R. A. 170..... 31

Rules of the Supreme Court, Rules 38, Section 5, subd. B 3

35 Stat. L. 1143..... 30

U. S. C. A., Title 9, Section 2..... 19
U. S. C. A., Title 9, Section I..... 5
U. S. C. A., Title 9, Section 8..... 5, 8
U. S. C. A., Title 28, Section 347..... 6

Text Book

5 Corpus Juris 20..... 18

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the causes entitled as above was rendered April 10, 1934, and is cited in the Federal Reporter, in 70 Fed. (2d) 234, and is set forth in full in the transcript of record (Apostles on Appeal) at page 162.

I. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The date of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit to be reviewed was April 10, 1934. (Apostles on Appeal, pages 168, 169.)

A petition for a rehearing was filed and the date of the denial thereof is the 11th of July, 1934. (Apostles on Appeal, pages 169, 170.)

II. THE SPECIFIC CLAIMS ADVANCED, AND THE RULINGS MADE, IN THE LOWER COURT, WHICH ARE RELIED UPON AS THE BASIS OF THIS COURT'S JURISDICTION, ARE AS FOLLOWS, TO-WIT:

(1) That the Honorable Circuit Court of Appeals in its opinion in this cause (70 Fed. (2d) 234) has committed error in holding in substance and effect that a decree or order of a District Court sitting in Admiralty directing the libelant and the libellees to proceed to arbitration and staying trial pending such arbitration (Apostles on Appeal, page 88) is an interlocutory and non-appealable order.

(2) That the said Honorable Circuit Court of Appeals has entered a decision herein in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit, the decision of the Circuit Court of Appeals for the Second Circuit in *Krauss Bros. v. Bossert & Sons,* 62 Fed. (2d) 1004, **"that the decree is final and appealable"**. (See Rule 38, Sec. 5, Subd. B of the Rules of the Supreme Court.) That in a previous decision in *California Prune and Apricot Growers' Ass'n. v. Catz American Co.,* 60 Fed. (2d) 788, the Circuit Court of Appeals for the Ninth Circuit, which rendered the decision sought to be reviewed, treated an order directing the submission of a controversy to arbitration as a final order and disposed of the question on the merits, though it did not directly pass upon the question of the appealability of the order.

(3) That the said Circuit Court of Appeals has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority in this, to-wit: that the only cases cited in the opinion of the Circuit Court of Appeals involving the appealable character of an order directing the parties to proceed to arbitration, pronounce a rule opposite to the decision of the Circuit Court of Appeals in the instant case, and reach a contrary conclusion. (See Justice Cardozo's opinion in *Marchant v. Mead Mfg. Co.,* 252 N. Y. 284, 169 N. E. 386, and *Hosiery Mfg. Co. v. Goldston,* 238 N. Y. 22, 143 N. E. 779.)

(4) That the said Circuit Court of Appeals in the decision aforesaid, has decided an important question

of Federal law which has not been, but should be, settled by this Court; to-wit, whether a decree in admiralty directing the parties to proceed to arbitration is a final and appealable, or an interlocutory and non-appealable order.

(5) That the said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure and has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision, to-wit, that said Circuit Court of Appeals by treating the order of the District Court as non-appealable, has sanctioned an order of the District Court, which, in effect, decrees the specific performance of a purported arbitration provision which is void on its face, because it shows on its face that it is an attempt to oust the Courts of their jurisdiction.

(6) That the said Circuit Court of Appeals erred in dismissing the appeal from the decree of the District Court directing the parties to proceed to arbitration, because the purported arbitration provision in the contract of carriage in the instant case is void, in that it shows on its face that it is an attempted ouster of the jurisdiction of the Courts. (See Arbitration Agreement as set forth in Opinion of Circuit Court of Appeals, Apostles on Appeal, page 163.)

(7) Any provision in a contract of a carrier, by land or sea, wherein the carrier exempts itself from liability for injuries is void and against public policy; the District Court erred in holding otherwise; and because of the void character of the agreement the Circuit Court of Appeals erred in dismissing the ap-

peals herein without hearing the same upon the merits.

(8) The provision in the contract of carriage for arbitration is likewise void because made on behalf of a minor, and a minor is not bound by a provision for arbitration made on his behalf.

(9) The provision for arbitration contained in the contract in question does not fall within the provisions of the so-called United States Arbitration Act. (9 U. S. C. A., Sec. 8; Apostles on Appeal, pages 28, 163.)

(10) That the cause of action as set forth in the articles of the libel herein, to-wit, a cause of action for rape on the high seas upon the libelant Hildegard Schoenamsgruber by a member of the crew of respondent vessel and an employee of the respondent corporation is not "a maritime transaction" as defined in Section I of Title 9 of the United States Code Annotated, and is not in anywise, manner or condition subject to arbitration as provided in the said arbitration agreement or otherwise; that any contract agreeing to submit a claim for damages for such offense to arbitration was, and is, illegal and void and contrary to public policy and good morals; and the District Court erred in holding otherwise, and the said Circuit Court of Appeals erred in dismissing the appeal from the said decree of said District Court. (Apostles on Appeal, page 85.)

III. THE STATUTORY PROVISIONS.

The statutory provision under which jurisdiction is invoked is Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347.

IV. A REFERENCE TO THE CASES BELIEVED TO SUSTAIN THE JURISDICTION.

These decisions are set forth in the petition for a writ of certiorari on file herein, pages 11-13, and for the sake of brevity the quotations therein set forth from the said cases are not here repeated. These decisions are:

Krauss Bros. v. Bossert & Sons, 62 Fed (2d) 1004 (by the Circuit Court of Appeals of the Second Circuit);

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386 (opinion of Mr. Justice Cardozo);

Hosiery Mfg. Corp. v. Goldston, 238 N. Y. 22, 143 N. E. 777;

In re Utility Oil Corp., 69 Fed. (2d) 524;

California Prune and Apricot Growers' Ass'n. v. Katz American Co., 60 Fed. (2d) 788.

All of these decisions hold expressly or by implication that an order directing the parties to a suit to proceed to arbitration is a final order, and, in the language of Mr. Justice Cardozo, **"it is subject to direct review as a separable controversy"**.

A CONCISE STATEMENT OF THE CASE.

There could be no better or more concise statement of the case than the statement contained in the opinion of the Circuit Court of Appeals written in this cause by Judge Wilbur (Apostles on Appeal, page 162, 7 Fed. (2d) 234), which is as follows:

> "Two libels were filed in rem against the motorship 'Oakland', and in personam against the Hamburg American Line, a corporation, as owner of the motorship 'Oakland'. One of the libels was brought by Hildegard Schoenamsgruber, a minor, by Gustav Schoenamsgruber as her guardian ad litem, for $250,000 damages, and the other was brought by Gustav Schoenamsgruber on behalf of himself and his wife as the parents of said minor child for $50,000 damages. Both libels are based upon an alleged breach of a maritime contract for the carriage of the minor child, Hildegard Schoenamsgruber, from Hamburg, Germany, to San Francisco, California. The alleged breach consisted of the alleged misconduct of a certain chief cook aboard ship resulting in the infection of the six-year old daughter with a venereal disease.
>
> The libellees, in addition to denying the allegations of the libels, allege that the contract of transportation was entered into with the mother of the minor child and that it contained an agreement to arbitrate any complaints based upon a breach of the terms of the contract. The agreement was as follows:
>
> 'Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to

the agent of the Hamburg American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation **shall be final and his decision shall be accepted, both parties waiving recourse to the Courts at law.'**

The two libels were consolidated for trial, and on December 5, 1933, the trial Court made an order referring the controversy to the German Consul at San Francisco as arbitrator and directed that the proceeding be stayed pending the arbitration, and further provided:

'It is further ordered and decreed that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by the United States arbitration law, or otherwise permitted or required by law.'

This order was evidently based upon 9 U. S. C. A., Sec. 8, which is as follows:

'Proceedings begun by libel in admiralty and seizure of vessel or property. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure according to the usual course of admiralty proceedings, and the Court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.'

On the 14th day of December, notice of appeal from this order was given.

> The libellees moved for dismissal of the appeal on the ground that the order appealed from is not an appealable order because it is not final in the proceedings."

The Circuit Court of Appeals held that the order directing the parties to proceed to arbitration was a non-appealable, interlocutory order and entered a decree dismissing the appeal in each case. (Apostles on Appeal, pages 167, 168.)

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

These specifications are heretofore stated in Subdivision C-2 of this brief, and for the sake of brevity are not restated.

V. THE ARGUMENT.

SUMMARY OF THE ARGUMENT.

I. THE DECISION OF TH CIRCUIT COURT OF APPEALS IS CONTRARY TO AND IN CONFLICT WITH ALL THE PRIOR FEDERAL AND STATE COURT DECISIONS TOUCHING THE APPEALABLE CHARACTER OF A DECREE DIRECTING THE PARTIES TO PROCEED TO ARBITRATE.

II. THE PURPORTED ARBITRATION PROVISION OF THE CONTRACT IS VOID BECAUSE IT SHOWS ON ITS FACE THAT IT IS AN ATTEMPTED OUSTER OF THE JURISDICTION OF THE COURTS.

III. THE SO-CALLED ARBITRATION AGREEMENT IS AGAINST PUBLIC POLICY AND VOID AS AN ATTEMPT BY THE

STEAMSHIP COMPANY, NOT ONLY TO SAVE ITSELF FROM TORTS COMMITTED BY ITS SERVANTS, BUT TO COMPOUND THEIR CRIMES. ANY PROVISION IN A CONTRACT OF A CARRIER, BY LAND OR SEA, WHEREIN THE CARRIER EXEMPTS ITSELF FROM LIABILITY FOR INJURIES IS VOID AND AGAINST PUBLIC POLICY.

IV. THE SO-CALLED ARBITRATION PROVISION, EVEN IF OTHERWISE VALID, IS NOT BINDING UPON HILDEGARD SCHOENAMSGRUBER, A MINOR.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CONTRARY TO AND IN CONFLICT WITH ALL THE PRIOR FEDERAL AND STATE COURT DECISIONS TOUCHING THE APPEALABLE CHARACTER OF A DECREE DIRECTING THE PARTIES TO PROCEED TO ARBITRATE.

No decision is cited in the opinion of the Circuit Court of Appeals, nor was any cited by counsel for respondents in the proceedings below, which holds that an order or decree directing the parties to proceed to arbitration is interlocutory and non-appealable. The pertinent decisions are all to the contrary. The Circuit Court of Appeals of the Second Circuit in *Krauss Bros. v. Bossert & Sons,* 62 Fed. (2d) 1004, reaching a conclusion directly contra to the Circuit Court of Appeals for the Ninth Circuit in the instant case, says:

> "We held in *Marchant v. Mead-Morrison Co.,* 29 F. (2d) 40, that such a suit could not be removed to a federal court after the arbitrators had been appointed and had made their award, because the proceeding is single until its conclu-

sion. It does not follow that the order appointing arbitrators is not appealable under section 225 of title 28. **The purpose of arbitration is essentially an escape from judicial trial; the court takes a hand only so far as some sanction is necessary to compel the performance of the agreement to adopt the means provided.** It is true that under section 9 of title 9 (U. S. C. A.), the successful party may enforce the award by judgment on which execution will go under section 13. But the judgment follows automatically unless the award has been vacated under section 10, and that is an independent application. **So far as the arbitration proceeding itself is concerned, the last deliberative action of the court is the appointment of arbitrators who thereupon take over the controversy and dispose of it.** Their disposition is not, properly speaking, reviewed by the court, in spite of possible disturbance under sections 10 and 11. **It seems to us, therefore,** that the decree is final and appealable."

In *Marchant v. Mead Mfg. Co.,* 252 N. Y. 284, 169 N. E. 386, Mr. Justice Cardozo of this Court, who was at that time Chief Justice of the New York Court of Appeals, says:

> **"An order for the specific performance of an agreement to arbitrate a controversy is one that finally determines a special proceeding. The proceeding thus ended is not a part of the arbitration that is thereby set in motion. It is subject to direct review as a separable controversy. Like any other final order, the mandate, unless void, is not assailable collaterally."**

In *Hosiery Mfg. Corp. v. Goldston,* 238 N. Y. 22, 143 N. E. 779, the Court at the very beginning of the opinion says:

> **"A motion is made to dismiss the appeal on the ground that the order appealed from is not a final order. An order to proceed to arbitration under an arbitration agreement is a final order."**

In the case of *In re Utility Oil Corp.*, 69 Fed. (2d) 524, the Circuit Court of Appeals of the Second Circuit considered on the merits an appeal from an order denying a petition to compel a party to proceed to arbitration; and the Circuit Court of Appeals for the Ninth Circuit admits in this case, that in *California Prune and Apricot Growers' Ass'n. v. Catz American Co.*, 60 Fed. (2d) 788, it entertained an appeal from an order of the District Court directing the submitting of a controversy to arbitration, and that

> **"the order on its face appeared to be a final order and was treated as such by the parties and by the court."**

None of the authorities cited in the opinion of the Circuit Court of Appeals in support of its conclusion are in point, as none of them related to arbitration agreements; the only cases involving arbitration cited in the opinion hold directly contra to the conclusion reached by the Circuit Court of Appeals.

France & Canada S. S. Co. v. French Republic, 285 Fed. 290, was an appeal from a decree dismissing cross libels in admiralty. The Circuit Court of Appeals for the Second Circuit, in an opinion written by Judge Rogers, dismissed the appeals without prejudice, citing as authority, among other cases, *Oneida Navigation Corporation v. W. & S. Job & Co.*, 252 U. S. 521, where it is said that "a case may not be brought here in fragments". We are well cog-

nizant of this rule and fully mindful of the soundness thereof. To permit litigants to appeal at every step in the litigation from every adverse ruling would sanction piecemeal litigation, and be productive of a multiplicity of suits. The rule is, therefore, that the cause must be finally disposed of. But in the case at bar, there has been a final disposition of the matter. **The District Court has abdicated its jurisdiction to hear and determine the cause.** It is no answer to say that the District Court has attempted to reserve jurisdiction to enter a final judgment or decree upon the award of the arbitrator, because the Court has no power "as a Court of admiralty to arbitrate, reform or modify the terms of the contract by ordering an arbitration elsewhere, or otherwise than as agreed upon by the parties."

The Silverbrook, 18 Fed. (2d) 144, 147.

Moreover, Section 7 of the contract in question contains the provision that all controversies shall be determined according to German law. (Apostles on Appeal, page 62.) Accordingly, this Court cannot say that the lower Court ordered the matter to arbitration pursuant to the provisions of the so-called *United States Arbitration Code.* The Federal Courts have repeatedly held that they will not enforce a foreign code of arbitration. In *The Beechwood,* 35 Fed. (2d) 41, the Court says:

> "A stipulation, in a marine instrument of the type of the documents under consideration, for arbitration in London comes within the words of section 2 of the statute (9 U. S. C. A. 2). To construe those words, however, so as to include

such a stipulation plainly would make section 2 inconsistent with or would nullify or would render inoperative sundry provisions of sections 4, 7, 9, 10, 11 and 12 (9 U. S. C. A. 4, 7, 9-12); possibly also certain parts of sections 5, 8 and 13 (9 U. S. C. A. 5, 8, 13). Under well-settled rules it is imperative therefore that the general words of section 2 be limited in application so as not to embrace arbitrations abroad (e. g., *Peck v. Jenness,* 7 How. 612, 623, 12 L. Ed. 841; *Meydenfeldt v. Daney Gold & Silver Mining Co.,* 93 U. S. 634; *U. S. v. Trans-Missouri Freight Association,* 166 U. S. 290, 320, 17 S. Ct. 540, 41 L. Ed. 1007).

The same conclusion was reached in The Silverbrook (D. C.), 18 F. (2d) 144, and *The Fredensbro* (D. C.), 18 F. (2d) 983.

As the statute does not validate the arbitration clauses involved here, the cases are governed by the law as established by the Supreme Court and summarized in *United States Asphalt R. Co. v. Trinidad Lake P. Co.* (D. C.) 222 F. 1006."

The Circuit Court of Appeals in the instant case has in effect granted a decree for the specific performance of an agreement to submit all matters in controversy to the consular agent of a foreign government, not bound by our law and not amenable to the process of our Courts, disqualified by reason of the fact that he represents the sovereignty which owns the libeled vessel. Such a decree is, of course, final in its nature and, therefore, appealable.

The case of *Cox v. Graves,* 55 Fed. (2d) 217, is likewise indecisive of any of the issues presented upon this appeal. The appeal in that case was in an action

at law where an equitable defense setting up fraud in the procurement of a contract was pleaded. The special plea was heard by the Court sitting in equity and an order was entered that the plea be rejected and that the cause be restored to the law docket that the legal issues involved might be tried before a jury. It was very properly held that the order was not appealable. The decision of Judge Wilbur in *Waialua Agr. Co. v. Christian,* 52 Fed. (2d) 847, is likewise not in point. In that case, a decision of the Supreme Court of Hawaii vacated the decree of the lower Court and remanded the cause with instructions to permit the amendment of the pleadings and to receive additional evidence. The decree did not purport on its face to be final and was not in its nature final. It contemplated further proceedings in the Circuit Court. We have no quarrel with this decision, but we respectfully submit that it is absolutely inapplicable to the situation in the case at bar.

In *Gardner v. Grand Beach Co.,* 29 Fed. (2d) 481, the decree appealed from adjudged that the rate of interest borne by certain bonds secured by a deed of trust was usurious under the law of Illinois and required the deduction from the principal of the bonds of all interest paid thereon. The Court expressly reserved certain matters for future determination prior to the entry of a decree of foreclosure, should the same be thereafter ordered. Obviously, this decree was not final in its nature and the appeal was very properly dismissed.

The Circuit Court of Appeals further cites the second edition of *O'Brien's Manual of Federal Appel-*

late Procedure. We have the very highest respect for the opinion of the learned author of this useful and convenient work, who is Clerk of the Circuit Court of Appeals for the Ninth Circuit, but the citations in Mr. O'Brien's text do not in any manner support the conclusion reached in the decision of the Court below. They merely pronounce the general rule that mere interlocutory orders are not appealable, and Mr. O'Brien's text cites no decisions arising in cases of enforced arbitration.

It is highly significant that the only arbitration cases referred to in the opinion of the Circuit Court of Appeals pronounce a rule opposite to that laid down in the opinion, and reach a contrary conclusion. The Circuit Court of Appeals attempts to repudiate its own decision in *California Prune and Apricot Growers Assn. v. Catz American Co.,* 60 Fed. (2d) 788, on the ground that the jurisdictional question was not raised, and that the Court, therefore, considered the appeal upon the merits. Of course, the question of jurisdiction, even though not raised or argued, was before the Court, and the presumption is that the Circuit Court of Appeals would not have considered an appeal from a non-appealable order. It is noteworthy that the contract in that case provided that "any disputes arising under this agreement to be settled by friendly arbitration", etc. The order of the lower Court was almost identical with the order in the case at bar, because it directed that the parties be summarily directed to proceed with arbitration. We frankly confess that we are at a loss to understand how the order in that case could be

regarded as final, and the order in the case at bar as interlocutory, merely.

We, therefore, respectfully submit that the decision of the Circuit Court of Appeals in this cause is at variance with all prior decisions of State and Federal Courts.

II.

THE PURPORTED ARBITRATION PROVISION OF THE CONTRACT IS VOID BECAUSE IT SHOWS ON ITS FACE THAT IT IS AN ATTEMPTED OUSTER OF THE JURISDICTION OF THE COURTS.

The alleged provision for arbitration is as follows:

> "Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg-American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation **shall be final and his decision shall be accepted, both parties waiving recourse to the courts at law.**" (Apostles on Appeal, page 45.)

It will be noted that the contract, upon its face, is a waiver of the right to resort to judicial proceedings. Such agreements have always been held void.

> "Parties will not be permitted, by agreement, to submit to arbitration, to oust the jurisdiction of the courts, whether the agreement relates to existing differences or to those which may arise in the future. In other words, the courts may disregard such agreements, assume jurisdiction and

> determine the matters in dispute which constitute the subject matters of the agreements, on the principle that the parties cannot deprive themselves of the right to resort to the proper legal tribunals for the submission of their controversies. The general principle that courts favor arbitration and will indulge every reasonable presumption to uphold arbitration proceedings is directly limited to proceedings which have resulted in an award, in consequence of which submission to arbitration cannot be specifically enforced and the parties to the submission may revoke it at any time before the award is made."
>
> 5 *Corpus Juris* 20.

It is an elementary rule that agreements whose object is to oust the jurisdiction of the Courts are contrary to public policy and will not be enforced.

In *Guaranty Trust and Safe Deposit Company v. Green Cove and Melrose Railroad Co.,* 139 U. S. 137, a suit was brought to foreclose a mortgage in the form of a deed of trust which contained a power of sale and which contained a further provision making the exercise of the power of sale the exclusive remedy of the mortgagee. The lower Court dismissed the foreclosure proceeding, and its judgment was reversed by the Supreme Court of the United States, holding:

> "It is true there is a subsequent provision in the deed of trust to the effect that neither the whole nor any part of the premises mortgaged shall be sold, under proceedings either at law or equity, for the recovery of the principal or interest of the bonds, it being the intention and agree-

ment of the parties that the mode of sale provided by the mortgage shall be exclusive of others. **This clause, however, is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which, as is settled by the uniform current of authority, cannot be done.''**

The case of *Potomac Steamboat Co. v. Baker Salvage Co.,* 123 U. S. 40, is even more strongly in point. That was a libel *in rem* in a case of salvage. The libelee pleaded an arbitration agreement. The Supreme Court dismisses this contention in the following language:

> ''Nor can the agreement for arbitration affect the question of the salvage service. In the case of the Resby, 10 P. D. 114, there was an agreement to tow a ship in distress 'the matter of compensation to be left to arbitrators at home, to be appointed by the respective owners'. As to this, Sir James Hannan said: 'This, however, was valueless as an agreement. It could not have been pleaded as any answer to an action for salvage brought in the ordinary way in the admiralty division, and if effect could have been given to it at all, it would only have been by bringing an action upon it for not submitting to arbitration.' ''

The only answer to the general provisions of law contained in the foregoing decisions of the Supreme Court of the United States, is that the so-called United States Arbitration Act, which is here in question, provides, in substance and effect, that (Section 2, U. S. C. A., Title 9):

> "A written provision in any maritime transaction, or a contract evidencing a transaction involving commerce, to settle by arbitration, a controversy thereafter arising out of such contract or transaction, or the refusal to perform the same, or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, or refusal shall be valid, irrevocable and enforcible, save upon such grounds as exist at law and equity for the revocation of any contract."

It will be argued that under and by virtue of the provisions of the said act just quoted, the common law rules that inhibit contracts for the ouster of the jurisdiction of Courts have been abrogated by the statute. To this contention there are two answers: *First,* the statute itself in Sections 5-12 thereof clearly recognizes that an agreement to submit to an arbitrator, whose decision shall be final, is void, because it prescribes methods and modes of procedure to be taken and had before the arbitrator.

Second. It is obvious that under the provision of the statute which we just quoted, an agreement to submit to arbitration which would be revocable either at law or in equity, is invalid and will not be enforced.

The instant agreement because it attempts an ouster of the jurisdiction of the Courts over a matter properly cognizable on the admiralty side of the Court, must of necessity be null and void. That the agreement is revocable at the instance of the minor, we shall hereafter demonstrate.

Since the enactment of the arbitration act, it has been held in at least one well considered decision that such an agreement as the one in the case at bar is not, properly speaking, an agreement for arbitration at all. On the other hand, such an agreement is an agreement to forbear a suit or resort to judicial remedies and, therefore, under the well-known elementary principle of the common law is void.

In the case of *In re Thurston,* 48 Fed. (2d) 578, a decision of the Circuit Court of Appeals for the Second Circuit, it is clearly and distinctly held that an agreement, such as that in the case at bar, is not an arbitration agreement at all, and that an award made by an arbitrator selected thereunder cannot be confirmed by the Court. The essential facts in that case are as follows: A marine insurance policy covering the barge provided that in case of loss a survey should be made by surveyors—one appointed by each party—and if they failed to agree, an umpire might be appointed, pursuant to the United States Arbitration Act. An umpire was appointed by the Court. The order appealed from confirmed the report in its essential particulars. The clause of the policy provided for the appointment of the umpire read as follows:

> "If the surveyor appointed by these Insurers cannot agree with the surveyor appointed by the Assured upon an umpire, either party hereto may apply to the United States District Court for the district in which the home port of the vessel insured hereunder is located, for the appointment of an umpire pursuant to the United States Arbitration Act. The surveyors, or the umpire, if it shall become necessary to name one, shall make

specifications in writing, clearly stating both the amount of work and the manner in which it shall be done to make said vessel good in respect of any damage caused by the disaster. Such specifications shall be binding both upon the Assured and these Insurers as to the extent of damage and the manner in which the work shall be done, subject, nevertheless, to the policy terms and conditions and the question of whether or not the disaster and resulting loss or damage are covered by this policy."

In reversing the order confirming the report of the umpire, the Circuit Court of Appeals says of the parties to the contract:

"They did not stipulate for arbitration under this act. But the court confirmed by order a report which recited the appointment of the umpire, the fact that a survey was made of the barge and the repair specifications noted, and recommended the various repairs to be made. No judgment could be entered on this report. Under the United States Arbitration Act, provision is made for the entry of a decree upon the award 'if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty', and 'the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings. By section 9 of the act the decree might be entered if the parties had stipulated in their policy for arbitration and that **judgment of the court should be entered upon the award made pursuant to the arbitration. But here the parties did not bring their dispute within either Section 8 or**

Section 9 of the Act. On the contrary, as above pointed out, they stipulated that the report of the umpire would be conclusive upon them. The other sections of the United States Arbitration Act are inapplicable here.

Since the policy does not substitute arbitration for a suit under it, but provides for a board to determine the facts as found here, which shall be conclusive upon the parties (citing cases), there was no jurisdiction in the court below to confirm this report.

The order will therefore be reversed, with directions to dismiss the petition for confirmation of the report."

The decision on the *Thurston* case is extremely apposite and is conclusive of the issues involved in the case at bar. It appears on the face of the so-called arbitration agreement, contained in Section 18 of the alleged contract between Mrs. Leischen Schoenamsgruber and the Hamburg American Line (Apostles on Appeal, page 45), that it is the intention of the parties not to submit the cause to arbitration and obtain an award thereon as provided in the United States Arbitration Act, but that any claim for damages which the passenger may have against the carrier shall be **immediately** submitted to the agents of the line at the port of disembarkation, and that in the event of a failure of the parties to agree, the decision of the German Consul shall be final and conclusive, **and that the parties waive all right to redress in the Courts of this country.** Such a provision, under the most elementary principles of law, and

particularly under the rules stated in the last cited case, is absolutely void.

The general rule is well stated by Judge Kerrigan in *Blodgett v. Bebe Co.,* 190 Cal. 665, 214 Pac. 38, 26 A. L. R. 1073:

> "It was early settled in the jurisprudence of this state, in conformity with that of practically all the states, that an agreement between parties to a contract to arbitrate all disputes thereafter to arise thereunder is invalid and unenforceable, as constituting an attempt to oust the legally constituted courts of their jurisdiction, and to set up private tribunals, but that if the matter to be submitted to the arbitrators was the mere finding of a fact, or facts, the determination of which is essential to the accrual of the cause of action itself, such arbitration or finding becomes a condition precedent to the right to sue, and is, therefore, not within the general rule. Judges and commentators have ascribed the origin of the rule to the jealousy of courts in the matter of their power and jurisdiction, and have been somewhat inclined to criticize it on that ground. **Another and better ground assigned for it is that citizens ought not to be permitted or encouraged to deprive themselves of the protection of the courts, by referring to the arbitrament of private persons or tribunals, in no way qualified by training or experience to pass upon them, questions affecting their legal rights.**"

III.

THE SO-CALLED ARBITRATION AGREEMENT IS AGAINST PUBLIC POLICY AND VOID AS AN ATTEMPT BY THE STEAMSHIP COMPANY NOT ONLY TO SAVE ITSELF FROM TORTS COMMITTED BY ITS SERVANTS, BUT TO COMPOUND THEIR CRIMES. ANY PROVISION IN A CONTRACT OF A CARRIER, BY LAND OR SEA, WHEREIN THE CARRIER EXEMPTS ITSELF FROM LIABILITY FOR INJURIES IS VOID AND AGAINST PUBLIC POLICY.

Passing from the fact that the so-called arbitration agreement is not an arbitration agreement at all and does not fall within the purview of the act under which the Honorable District Court assumed to make the direction contained in the order complained of, there is the broader and deeper consideration that the contract in question in so far as it attempts, if it does, to relieve the appellees—even to permit the claim to be arbitrated—of liability for a maritime tort such as the one here involved, is not only void under every statute of the United States and every State of the Union, but under the most fundamental and well recognized principles of international law. Contracts of this character have been uniformly held to be only unilateral in their character and not to be binding upon the passenger in the absence of a showing that the purchaser of a ticket knew or had his attention called to the provisions of the contract. In the case at bar, there is no such showing, and there could not well be, for the reason that the passenger in question was a female minor of the age of less than six (6) years, and presumably could not read. The ticket was not purchased in Germany, but was bought by the father of the infant for the conveyance of his wife and daughter from Hamburg, Germany, to San Fran-

cisco, California. An inspection of the photostatic copy of the ticket annexed to the affidavit of the learned proctor for the libellees, which we have heretofore referred to, will show that the terms and conditions relied upon by the libellees were printed in type so small that they cannot be read by anyone with ordinary eyesight without the aid of a magnifying glass. (See photostatic copy of ticket, Apostles on Appeal, pages 45 and 46.) The father, at the time that he contracted, knew nothing of its terms and conditions; the mother, at the time that the ticket was delivered to her and when she signed, if she did sign the agreement in question, did not know that there was any such provision in the terms of her passage. The Courts of this country have uniformly held that in transactions between a common carrier of persons and a passenger, the positions of the two parties are not relatively the same. The passenger cannot negotiate, he cannot haggle, as it were, with the carrier. In many places, at many railroad stations, and in many seaports, the only means of transportation furnished are those which are furnished by some one railroad or steamship line. The parties involved do not sit down together, they do not discuss pro and con the terms and conditions of the contract. The carrier may take the position of "take it or leave it". Accordingly, the Courts have uniformly held that such contracts are purely unilateral in their character, and will not be enforced in the absence of a showing that the passenger fully knew, appreciated, and understood, all of the terms of the contract. This rule has been stated, with his customary felicity, by Chief

Justice White, in the case of *The Kensington,* 46 Law. Ed. 190. In the statement of facts preceding the opinion of the Court, it is said:

> "There was no proof tending to show that at the time the ticket was issued the attention of Mrs. Bleecker or her daughter was called to the fact that it embodied exceptional stipulations relieving the company from liability, or that such conditions were agreed to, except in so far as a meeting of minds on the subject may be inferred from the fact of the delivery of the ticket by the company, and its acceptance, and that it contained on its face, in small but legible type, among others, the stipulations which are relied upon."

The learned Chief Justice says, in part:

> "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary."

The statement made by Chief Justice White, as to the law, has been acquiesced in by the Courts for at least a century. The reason for the rule is that the carrier and the passenger do not stand upon the same footing. As stated by Judge Butler in *The Glenmavis,* 69 Fed. 472:

> "That the intent of the parties in this regard is thus expressed is, therefore, immaterial. In every instance where the courts have declared

such stipulations void, it has, of course, been against the express agreement of the parties. We have determined that such contracts are harmful and wrong; that they tend to encourage negligence, and justify oppression; that they affect injuriously not only the immediate parties, but the public at large; and that they are therefore unlawful."

In the leading case of the *New England,* 110 Fed. 415, it is held that where a passenger's trunk, which, when delivered by her to the steamship company, contained her wearing apparel, could not be found at the end of the voyage, and when afterwards forwarded to her was empty, and the company refused to give any explanation and when sued for the loss, introduced no evidence as to the care or treatment of the trunk while in its possession, a provision in the ticket issued by an English steamship company to a passenger in the United States for passage from an American to an English port that the contract shall be governed by the English law, was ineffectual to render valid a stipulation to exempt the company from liability which is contrary to the public policy of the United States.

In *Moses v. Hamburg American Packet Company,* 88 Fed. 329, it was held in a libel for collision in New York harbor causing loss of a hand of a boy four years old, a steerage passenger, that the steamer, being in fault, was not exempt by reason of a limitation expressed in the ticket to one hundred dollars for any personal injuries, this not being a reasonable provision.

The rule that the Courts will not uphold exemptions from liability contained in provisions printed upon tickets issued by railroad or steamship companies or other common carriers, is well stated by the Circuit Court of Appeals for the Second Circuit, in *Oceanic Steam Navigation Co. v. Corcoran,* 9 Fed. (2d) 724:

> "The courts of the United States recognize the fact that **the common carrier and his customer do not stand upon a footing of equality, and that the individual customer has no real freedom of choice.** He cannot afford to higgle or stand out. He prefers to accept any bill of lading the carrier tenders him, for in many cases he has no alternative; and it is against the policy of the law to allow a public carrier to abandon its obligations to the public by stipulating for exemptions which are unreasonable and which excuse it from negligence in the performance of its duty. That such contracts are illegal and void under any law is well settled. (Citing numerous cases.)"

If contracts by which a carrier attempts to exempt itself from liability for ordinary injuries to the person,—if contracts limiting the amount of damages to which the carrier shall be subject for the loss of baggage of the passenger are illegal and void because of their unreasonable and wholly unilateral character,—how, then, can it be said, under any principle of law, that an agreement which forces a female child under the age of six years,—outraged by a member of the crew of the vessel upon which her passage has been paid, to submit her claim to arbitration, can by any peradventure be valid? If such a rule be valid,

every woman passenger upon a vessel holds her chastity at the mercy of the crew; if she brings a suit for damages, she has no recourse to the Courts of the country in which she is disembarked. She must submit her claim to the Consul of the very nation whose flag is flown by the vessel upon which she was attacked.

Offenses of this character have always been regarded as the most flagrant under the maritime law. Under the law of this country, rape upon the high seas is punishable by death. (35 Stat. L. 1143.)

How, then, can such a crime be compounded by a compulsory arbitration, not signed by the party to be charged, particularly when the so-called arbitration agreement expressly states that neither party may resort to Courts of law, but must take the decision of a foreign non-judicial officer?

IV.

THE SO-CALLED ARBITRATION PROVISION, EVEN IF OTHERWISE VALID, IS NOT BINDING UPON HILDEGARD SCHOENAMSGRUBER, A MINOR.

At the time that the so-called arbitration agreement was executed, the petitioner Hildegard Schoenamsgruber was five (5) years of age. That an infant is incapable of entering into a valid contract for arbitration is too plain to admit of question, and it is likewise obvious that the right of the little girl to the security of her own person could not be bartered away by her parents.

It is scarcely necessary to cite authorities in support of the proposition that a minor, disqualified for the most part to make any contract, and always having the right of disaffirmance, saving, perhaps, in the case of a contract for the necessities of life, cannot be bound by an agreement to submit a controversy to arbitration. Thus in the case of an agreement to submit a will contest to arbitration, the Court says:

> "There are many other reasons why this submission cannot be sustained. **The principal beneficiary under the will, being a minor, was not bound by it.**"
>
> *Estate of Carpenter,* 127 Cal. 582, 585.

In *District of Columbia v. Bailey,* 171 U. S. 161, 43 L. Ed. 118, 124, the Court says:

> "The general rule is 'that everyone who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; **but no one can, who is either under a natural or civil incapacity of contracting.**' "

In *Millsaps v. Estes,* 137 N. C. 535, 70 L. R. A. 170, it was held that an attempt to submit the cause of an infant to arbitration by parties acting on his behalf is absolutely void. On rehearing the Court in a very learned review of the authorities holds that the agreement is voidable. In a lengthy footnote to the decision (70 L. R. A. 170, et seq.), a large number of cases are cited which hold, with very few exceptions, that a parent, guardian or next friend has no power to submit an infant's interest to arbitration so as to bind the infant. Even if the arbitration provision in the instant case were only voidable, the situation

would not be changed, for the reason that the petitioner Hildegard Schoenamsgruber, by counsel, moved the District Court for a revocation of the arbitration agreement (Apostles on Appeal, pages 75, 76), which order was in effect denied by the order of the District Court on rehearing directing the parties to proceed to arbitration. (Apostles on Appeal, page 85.)

In the note to *Millsaps v. Estes,* supra, it is stated that as early as the reign of Henry VI the conclusion was reached that a plea of under-age at the time of a submission to arbitration for a trespass done by the infant is sufficient to invalidate the award.

And in *Britton v. Williams,* 6 Munf. 453, the Court says:

> "Although infants are bound by judgments had under the superintendence and protection of the Court, yet, where the case is referred to arbitrators, whereby they are deprived of that protection, a submission by infants, **even by rule of Court,** ought not to be sanctioned; for, as awards are in the nature of judgments and are to be final and conclusive, which cannot be where one party has the right to void them, it follows that a submission by infants, although with adults, cannot be obligatory on either party."

CONCLUSION.

It is respectfully submitted that the decree of the District Court directing the parties to proceed to arbitration is a final and appealable order, and the Circuit Court of Appeals committed error in dismissing the appeal from said decree. It is likewise sub-

mitted that the purported arbitration agreement is void as against public policy, is contrary to every principle of municipal law and the law of nations, and to the most fundamental concepts of morality and justice. And it is also respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, and that this Court should in the exercise of its undoubted power, **dispose of the entire cause,** or, in any event, that the cause should be remanded to the Circuit Court of Appeals with directions to hear and determine the appeals from the District Court on the merits. As the order granting certiorari in this cause did not limit the consideration to any particular question, we have briefed the case on the merits as well as on the question of the appealability of the order of the District Court.

Dated, San Francisco, California,
November 19, 1934.

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